Supreme Court, U.S.
FILED

011714 MAY 17 2002

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 2001

GIRALDO ORLANDO FERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL MORRIS
Counsel of Record
9130 South Dadeland Boulevard
Suite 1528
Miami, Florida 33156

Counsel for Petitioner

41 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE RULE OF *APPRENDI v. NEW JERSEY*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) APPLIES TO A SENTENCE IMPOSED PURSUANT TO THE UNITED STATES SENTENCING GUIDELINES WHERE, ALTHOUGH THE SENTENCE DOES NOT EXCEED THE MAXIMUM TERM AUTHORIZED BY THE STATUTES PLED IN THE FEDERAL INDICTMENT, THE SENTENCE IS BASED UPON A SPECIFIC DRUG QUANTITY NEITHER PLED IN THE INDICTMENT NOR FOUND BY THE JURY, AND THE SENTENCE EXCEEDS THE MAXIMUM TERM OF IMPRISONMENT AUTHORIZED BY THE SENTENCING GUIDELINES FOR THE DRUG QUANTITY WHICH WAS PLED.

TABLE OF CONTENTS

Page

OPINION BELOW 5

STATEMENT OF THE BASIS FOR JURISDICTION . . . 6

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 6

STATEMENT OF THE CASE 6

ARGUMENT 9

THE RULE OF *APPRENDI V. NEW JERSEY* SHOULD APPLY TO A SENTENCE IMPOSED PURSUANT TO THE UNITED STATES SENTENCING GUIDELINES WHERE, ALTHOUGH THE SENTENCE DOES NOT EXCEED THE MAXIMUM TERM AUTHORIZED BY THE STATUTES PLED IN THE FEDERAL INDICTMENT, THE SENTENCE IS BASED UPON A SPECIFIC DRUG QUANTITY NEITHER PLED IN THE INDICTMENT NOR FOUND BY THE JURY, AND THE SENTENCE EXCEEDS THE MAXIMUM TERM OF IMPRISONMENT AUTHORIZED BY THE SENTENCING GUIDELINES FOR THE DRUG QUANTITY WHICH WAS PLED. 9

CONCLUSION 14

APPENDIX App. 1-25

TABLE OF CITED AUTHORITIES

CASES **Page**

Apprendi v. New Jersey,
530 U.S. 466, 120 S.Ct. 2348,
147 L.Ed.2d 435 (2000) ..... *passim*

Jones v. United States,
526 U.S. 227, 119 S.Ct. 1215,
143 L.Ed.2d 311 (1999) ..... 10 - 12

Harris v. United States, cert. granted,
No. 00-10666 (December 10, 2001) 14

McMillan v. Pennsylvania,
477 U.S. 79, 106 S. Ct. 2411,
91 L.Ed.2d 67 (1986) 10, 11

Mistretta v. United States,
488 U.S. 361, 109 S.Ct. 647,
102 L.Ed.2d 714 (1989) 11, 12

United States v. Cotton, cert. granted,
No. 01-687 (January 2, 2002) 14

United States v. Nealy,
232 F.3d 825 (11th Cir.2000) 8

United States v. Orga, et al.,
No. 01-10241 (11th Cir.January 23, 2002) 5

United States v. Sanchez,
269 F.3d 1250 (11th Cir.2001) 8

STATUTES AND OTHER AUTHORITIES

18 U.S.C. § 3553(b) 12

21 U.S.C. § 841 . . . . . 6, 7

21 U.S.C. § 846 . . . . . 6, 7

28 U.S.C. § 1254(1) 6

The End of the Era of Sentencing Guidelines:
Apprendi v. New Jersey,
87 Iowa L. Rev. 775 (2002) 13

CITATION OF THE OPINION BELOW

The opinion of the court of appeals is reproduced in the Appendix filed herewith. (App. 1-3). The opinion, *United States v. Orga, et al.*, No. 01-10241 (11th Cir.January 23, 2002), is unpublished.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on January 23, 2001. A timely filed application for extension of time within which to file this petition for writ of certiorari was granted to May 23, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 846 provides: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

21 U.S.C. § 841 appears in its entirety in the Appendix. The subsections of the statute involved in this petition are as follows: 21 U.S.C. § 841(a), which provides, in pertinent part, that "it shall be unlawful for any person knowingly or intentionally ... to ... possess with intent to ... distribute ... a controlled substance..."; 21 U.S.C. § 841(a) which prohibits, in pertinent part, possession with intent to distribute a controlled substance; 21 U.S.C. § 841(b)(1)(A), which provides a penalty of ten years to life imprisonment for possession of at least 5 kilograms of cocaine; and 21 U.S.C. § 841(b)(1)(B), which provides a penalty of five to forty years' imprisonment for possession of at least 500 grams, but less than 5 kilograms, of cocaine.

STATEMENT OF THE CASE

The petitioner was charged by a third superseding federal indictment as follows: count one -- conspiracy from

1996 to 2000 to possess with intent to distribute five or more kilograms of cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(ii); count two -- possession on November 30, 1999 with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(ii); and count three -- possession on February 13, 2000 with intent to distribute five hundred grams or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841 (b)(1)(B)(ii). (App. 5-6). A trial by jury was conducted.

With regard to drug quantity, as to count one, the jury was instructed, consistent with the indictment, that the government was required to prove only that there was a conspiracy to possess with the intent to distribute "five kilograms or more of cocaine." (App. 19). As to counts two and three, the jury was instructed that the government was required to prove that the petitioner "possessed five kilograms or more" of cocaine, and that he "possessed 500 grams or more" of cocaine, respectively. (App. 20). The jury returned a general verdict of guilt as to each count. The jury made no findings attributing to the petitioner any specific drug quantities.

At his sentencing hearing, the petitioner objected to the imposition of any sentence exceeding the minimum drug quantities specifically pled in the indictment. (App. 21, 23-24). The petitioner argued that any drug amounts neither pled nor found by the jury beyond a reasonable doubt could not, consistent with this Court' decision in *Apprendi*, form the basis for a sentence. *Id.*

The district judge rejected the petitioner's arguments (App. 24), and attributed to him in excess of 150 kilograms of cocaine (App. 24-25), yielding a base offense level of 38 under the United States Sentencing Guidelines. The district judge also found that the petitioner was a manager or supervisor resulting in an additional three levels. (*Id.*). As a result, the petitioner's base offense level pursuant to the Sentencing Guidelines was

41, yielding an imprisonment range from 324 to 435 months. (App. 24-25). The petitioner was sentenced to imprisonment for 324 months on each count to run concurrently, and assessed $100 on each count for a total of $300. (App. 25). On appeal to the Eleventh Circuit, the petitioner challenged his sentencing as violative of *Apprendi*.

In the Eleventh Circuit, *Apprendi* does not apply to judge-made determinations pursuant to the Sentencing Guidelines, see *United States v. Sanchez*, 269 F.3d 1250, 1262 (11th Cir.2001), *United States v. Nealy*, 232 F.3d 825, 829 n.3 (11th Cir.2000), and a sentencing court's factual finding under the Guidelines is deemed within the statutory range thereby removing the sentence from the express holding of *Apprendi*. See *Sanchez*, 269 F.3d at 1262.

In the Eleventh Circuit, the petitioner challenged these holdings and expressly preserved his right to relief should this Court extend the reasoning of *Apprendi* to a sentence under the Guidelines. (App. 18).

Consistent with its prior holdings, the Eleventh Circuit rejected the petitioner's challenge, ruling that "*Apprendi* is not implicated" because the petitioner was "sentenced within the applicable statutory range." (App. 3).

ARGUMENTS AND AUTHORITIES

THE RULE OF *APPRENDI v. NEW JERSEY* SHOULD APPLY TO A SENTENCE IMPOSED PURSUANT TO THE UNITED STATES SENTENCING GUIDELINES WHERE, ALTHOUGH THE SENTENCE DOES NOT EXCEED THE MAXIMUM TERM AUTHORIZED BY THE STATUTES PLED IN THE FEDERAL INDICTMENT, THE SENTENCE IS BASED UPON A SPECIFIC DRUG QUANTITY NEITHER PLED IN THE INDICTMENT NOR FOUND BY THE JURY, AND THE SENTENCE EXCEEDS THE MAXIMUM TERM OF IMPRISONMENT AUTHORIZED BY THE SENTENCING GUIDELINES FOR THE DRUG QUANTITY WHICH WAS PLED.

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. at 2362-63. Although *Apprendi* concerned judge-found fact that increased the defendant's statutory maximum sentence, whereas the petitioner's sentence was imposed within a range prescribed by the Sentencing Guidelines, the same constitutional concerns at issue in *Apprendi* are present here for two reasons: first, the petitioner's legally prescribed punishment under the Sentencing Guidelines was substantially increased based solely upon judge-found facts; and second, the sentence imposed exceeded the maximum Guidelines sentence authorized by the only drug quantity pled in the indictment.

A "scheme that keeps from the jury facts that 'expos[e] [defendants] to greater or additional punishment,' may raise

serious constitutional concerns." *Apprendi*, 530 U.S. at 486, 120 S.Ct. at 2360 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88, 106 S. Ct. 2411, 2417, 91 L.Ed.2d 67 (1986)). It is true that this Court in *Apprendi* expressly declined to decide whether the due process concerns at issue there applied to cases involving the Sentencing Guidelines. See *Apprendi*, 530 U.S. at 497 n.21, 120 S.Ct. at 2366 n.21. However, in the lead opinion, Justice Stevens stated that it "'is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" 530 U.S. at 490, 120 S.Ct. at 2363 (quoting *Jones v. United States*, 526 U.S. 227, 252, 119 S.Ct. 1215, 1228 (1999) (Stevens, J., concurring)). Consistent therewith, the four dissenting justices noted the following:

> The actual principle underlying the Court's decision may be that any fact (other than prior conviction) that has the effect, in real terms, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt ... The principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e.g.*, the Federal Sentencing Guidelines).

Apprendi, 530 U.S. at 543-44, 120 S.Ct. at 2391 (O'Connor, J., with whom Rehnquist, C.J., and Kennedy and Breyer, JJ., join, dissenting) (emphasis added).

Similarly, one member of the majority suggested that the reasoning of *Apprendi* could extend to fact-finding for purposes of the Sentencing Guidelines:

> It is likewise unnecessary to consider whether (and, if so, how) the rule regarding elements applies to the Sentencing Guidelines, given the unique status that they have under *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). But it may be that this special status is irrelevant, because the Guidelines "have the force and effect of laws." *Id.*, at 413 (Scalia, J., dissenting).

530 U.S. at 523 n.11, 120 S.Ct. at 2380 n.11 (Thomas, J., concurring).

As applied in this case, the Sentencing Guidelines, like the hate-crime statute in *Apprendi*, resulted in increased punishment based on the existence of certain facts -- here, drug quantities -- that were neither pled nor found by a jury. These certain facts, moreover, so greatly increased the punishment that the petitioner faced, and ultimately received, that they are "appropriately characterized as 'a tail which wags the dog of the substantive offense.'" *Apprendi*, 530 U.S. at 495, 120 S.Ct. at 2365 (quoting *McMillan*, 477 U.S. at 88, 106 S.Ct. at 2417).

Justice Stevens' reliance upon *Jones* for the constitutional rule announced in *Apprendi* logically extends the application of *Apprendi* to a case such as the petitioner's. Indeed, the sentence imposed in *Jones* was struck down even though it did not exceed the prescribed statutory maximum. The required allegations, proof, and findings by a jury should not be limited to those that increase penalties beyond the so-called statutory maximum. Rather, to implicate due process concerns, the fact removed from jury consideration need only increase the prescribed range of penalties to which the accused is exposed.

Because *Apprendi* requires that "all facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by a jury," *Apprendi*, 530 U.S. at 499, 120 S.Ct. at 2367 (Scalia, J., concurring), and because the punishment to which the petitioner eventually became subject was based upon facts regarding drug quantity that were not found by a jury, the petitioner's sentence violates the reasoning of *Apprendi*. Due process and the constitutional right to trial by jury demand that facts that substantially increase the "legally prescribed punishment" be found by a jury and established beyond a reasonable doubt.

The constitutional rationale of *Apprendi* should apply to the Sentencing Guidelines because, as Justice Thomas noted, they "have the force and effect of laws." 530 U.S. at 523 n.11, 120 S.Ct. at 2380 n.11 (quoting from Justice Scalia's dissent in *Mistretta*, 488 U.S. at 413). Because Congress has mandated that the courts "shall impose" sentences within guideline ranges (unless there are grounds for upward departure), see 18 U.S.C. § 3553(b), the upper end of each of those ranges is, in effect, a statutory maximum. Under *Apprendi*, any fact which increases this statutory maximum must be charged in the indictment, presented to the jury, and proved beyond a reasonable doubt. Under this reasoning, any facts offered by the government to justify an upward departure must be alleged and proved. Because the guideline range itself establishes a "statutory maximum", then any fact which causes that range to be higher must also be charged in the indictment, proved, and found by the jury.

As one commentator has stated, the views expressed by the Court in *Jones* and by Justice Thomas in *Apprendi*

> espouse the principle that the constitutional provisions requiring trial by jury and fair notice mean that all facts enhancing a sentence, and not just those extending the

> sentence beyond the statutory maximum, should be included in the indictment and proved to a jury. This position seems a plausible extension of *Apprendi*. The statutory maximum is not a line of demarcation that should have unique constitutional significance, especially where determinate guidelines sentencing has been adopted. It is the presumptive guidelines sentence, not the outlying statutory maximum, that forms the basis for the charging and plea negotiations, and that is the essential piece of information conveyed to the defendant in the indictment.

Standen, *The End of the Era of Sentencing Guidelines: Apprendi v. New Jersey*, 87 Iowa L. Rev. 775, 796-97 (2002) (citations omitted).

The *Apprendi* violation was prejudicial to the petitioner. The only seizures of cocaine established by the government at the petitioner's trial totaled ten kilograms. But the petitioner was sentenced based upon the district judge's determination that the conspiracy charged in count one, which encompassed the ten-kilograms seized but involved no other drug seizures, involved 150 kilograms of cocaine. The indictment's only references to drug quantities were "five kilograms or more" in counts one and two and "five hundred grams or more" in count three. Thus, consistent with its verdict of guilty as charged, the jury could reasonably have attributed to the petitioner only the 10 kilograms of cocaine. Indeed, at trial and sentencing, the parties strongly disputed the degree of the petitioner's involvement in the alleged conspiracy. In view of such uncertainty about the meaning of the jury's verdict with regard to drug quantity, the impact of *Apprendi*'s due process concerns is substantial in the petitioner's case.

The petitioner notes that the Court has granted certiorari in two cases involving *Apprendi* challenges. See *United States*

v. Cotton, cert. granted, No. 01-687 (January 2, 2002); *Harris v. United States*, cert. granted, No. 00-10666 (December 10, 2001). The challenges presented in those cases are different from the *Apprendi* challenge presented in the petitioner's case. However, the Court's resolution of those cases may have a bearing upon this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL MORRIS
Counsel for Petitioner

MAY 2002

APPENDIX

Index

	APP.
DECISION SOUGHT TO BE REVIEWED	1-3
THIRD SUPERSEDING INDICTMENT	4-6
TITLE 21, UNITED STATES CODE, SECTION 841	7-17
EXCERPT OF PETITIONER'S OPENING BRIEF IN THE COURT OF APPEALS	18
EXCERPTS FROM TRIAL PROCEEDINGS	19-20
EXCERPTS FROM SENTENCING PROCEEDINGS	21-25

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-10241
Non-Argument Calendar

D.C. Docket No. 00-00210-CR-PCH

Filed JAN 23, 2002

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HUGO ALBERTO ORGA, a.k.a. Che,
GIRALDO ORLANDO FERNANDEZ,
CORNELIUS SINGLETON,

Defendant-Appellants.

On Appeal from the United States District Court for the
Southern District of Florida

Before MARCUS, WILSON and FAY, Circuit Judges.

PER CURIAM:

Hugo Alberto Orga, Giraldo Fernandez, and Cornelius Singleton appeal their sentences for conspiracy to possess with intent to distribute five kilograms of cocaine pursuant to 21 U.S.C. § 846, and Orga and Fernandez also appeal their sentences for possession with intent to distribute cocaine pursuant to 21 U.S.C. § 841(a)(1). The appellants were sentenced to 130 months, 324 months, and 285 months, respectively. We affirm.

Appellants were involved in a large drug conspiracy which, according to the evidence, marketed hundreds of kilograms of cocaine. A variety of errors are alleged to have occurred during the trial. Appellant Singleton asserts: (1) That the trial court erred in denying his motions for severance, mistrial and new trial because the government proved two separate conspiracies but charged only one. (2) That his sentence violates the dictates of Apprendi v. New Jersey, 530 U.S. 466 (2000). Appellant Orga raises the same issues through his brief as to (1) and by adopting Singleton's brief as to issue (2). Appellant Fernandez raises the same two issues outlined above plus: (3) Whether it was error for the trial court to admit into evidence a statement made by Singleton incriminating Fernandez. (4) Whether the trial court erred in its sentencing when considering relevant conduct. (5) Whether the trial court erred in enhancing his sentence on the ground that he was a manager or supervisor of a criminal activity that involved five or more participants.

After studying the record and carefully considering these contentions, we find no reversible error.

The jury was properly instructed concerning the charges of the indictment and told that the government must prove one conspiracy and not multiple conspiracies in order to convict the appellants as to Count One. If there was error in admitting the statement of witness Careaga, it was certainly harmless. The district court did not err by sentencing Orga,

Fernandez and Singleton to their terms of imprisonment. Apprendi is not implicated in the present action since the defendants were sentenced within the applicable statutory range. We conclude that the district court did not commit clear error by assigning a manager or supervisor role to Fernandez. Evidence presented at trial indicated that Fernandez supplied at least 300 kilograms of cocaine to Singleton during the conspiracy. Evidence also indicated that Singleton owed Fernandez money for the supply of over 200 kilograms of cocaine. Further, we conclude, in light of the aforementioned evidence, that the district court did not commit clear error by holding Fernandez accountable for possessing with intent to distribute 150 kilograms of cocaine.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 00-0210-CR-HUCK(s)(s)
21 U.S.C. § 846
21 U.S.C. § 841(a)(1)
21 U.S.C. § 853
18 U.S.C. § 2

UNITED STATES OF AMERICA)
)
Plaintiff,)
vs.)
)
GIRALDO ORLANDO FERNANDEZ,)
CORNELIUS SINGLETON,)
a/k/a "Neal Singleton,")
HUGO ALBERTO ORGA,)
a/k/a "Che,")
BERNARDO CAREAGA,)
a/k/a "Cuco,")
HIPOLITO ANTONIO VASQUEZ,)
a/k/a "Pata Larga,")
a/k/a "Niko,")
and)
MARIANO DON-SANCHEZ,)
a/k/a "Maimbo,")
Defendants.)
_____/

THIRD SUPERSEDING INDICTMENT

The Grand Jury charges that:

COUNT ONE

From on or about January 1, 1996, the exact date being unknown to the Grand Jury, to on or about February 26, 2000, at Miami, Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

GIRALDO ORLANDO FERNANDEZ,
CORNELIUS SINGLETON,
a/k/a "Neal Singleton,"
HUGO ALBERTO ORGA,
a/k/a "Che,"
BERNARDO CAREAGA,
a/k/a "Cuco,"
HIPOLITO ANTONIO VASQUEZ,
a/k/a "Pata Larga,"
a/k/a "Niko,"
MARIANO DON-SANCHEZ,
a/k/a "Maimbo,"

did knowingly and intentionally combine, conspire, confederate and agree with each other and with others persons known and unknown to the Grand Jury, to possess with intent to distribute a Schedule II controlled substance, that is, five kilograms or more of a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Sections 846 and 841(b)(1)(A)(ii).

COUNT TWO

On or about November 30, 1999, at Miami, Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

GIRALDO ORLANDO FERNANDEZ,
HUGO ALBERTO ORGA,
a/k/a "Che,"
BERNARDO CAREAGA,
a/k/a "Cuco,"

did knowingly and intentionally possess with intent to distribute a Schedule II controlled substance, that is, five kilograms or more of a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A)(ii) and Title 18, United States Code, Section 2.

COUNT THREE

On or about February 13, 2000, at Miami, Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

GIRALDO ORLANDO FERNANDEZ,
HUGO ALBERTO ORGA,
a/k/a "Che,"
HIPOLITO ANTONIO VASQUEZ,
a/k/a "Pata Larga,"
a/k/a "Niko,"

did knowingly and intentionally possess with intent to distribute a Schedule II controlled substance, that is, five hundred grams or more of a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(ii) and Title 18, United States Code, Section 2.

UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13--DRUG ABUSE PREVENTION AND CONTROL SUBCHAPTER I--CONTROL AND ENFORCEMENT

PART D--OFFENSES AND PENALTIES

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(I) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of

ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if

the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(I) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more

than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term

of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5

years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if

the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution. (A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definitions. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required; shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of

imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals.

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to is, after such knowledge is acquired, such violation shall be fined under Title 18 or imprisoned not more than one year, or both.

EXCERPT OF PETITIONER'S
OPENING BRIEF IN
THE COURT OF APPEALS:

The defendant is aware of this Court's rulings holding that *Apprendi* does not affect determinations under the Guidelines, see *Camacho, supra* (and decisions cited), and that *Apprendi* does not apply to the "relevant conduct" provision of the Sentencing Guidelines. See *United States v. Harris*, ___ F.3d ___, 2001 WL 258400 (11th Cir. March 14, 2001) (and decisions cited). However, in the event the reasoning of *Apprendi* is extended to a sentence under the Guidelines, or to "relevant conduct", or both (by this Court sitting en banc or by the Supreme Court), the defendant expressly preserves his rights to relief.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 00-210-CR-HUCK

UNITED STATES OF AMERICA,

Plaintiff,

vs. MIAMI, FLORIDA

GIRALDO ORLANDO FERNANDEZ,
CORNELIUS SINGLETON, OCTOBER 24, 2000
HUGO ALBERTO ORGA,

Defendants.

EXCERPT FROM
TRANSCRIPT OF TRIAL TESTIMONY, CLOSING ARGUMENTS, JURY CHARGE BEFORE THE HONORABLE PAUL C. HUCK,
UNITED STATES DISTRICT JUDGE

[Page 158:]

THE COURT: *** What the evidence in the case must show beyond a reasonable doubt is, first, that two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the indictment. That is, to possess with the intent to distribute five kilograms or more of cocaine. And, second, that the defendant, knowing the unlawful purpose of the plan, willfully joined in that plan.

THE COURT: *** As to Count 2, the defendants can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First, that the defendant knowingly and willfully possessed five kilograms or more of a mixture and substance containing a detectible amount of cocaine as charged; and second, that the defendant possessed the substance with the intent to distribute it.

As to Count 3, the defendants can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First, that the defendant knowingly and willfully possessed 500 grams or more of a mixture and substance containing a detectible amount of cocaine as charged; and second, that the defendant possessed the substance with the intent to distribute it.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 00-210-CR-HUCK

UNITED STATES OF AMERICA,

Plaintiff,

vs. MIAMI, FLORIDA

GIRALDO ORLANDO FERNANDEZ,

JANUARY 3, 2001

Defendant.

EXCERPT FROM DAY 1 OF SENTENCING
BEFORE THE HONORABLE PAUL C. HUCK,
UNITED STATES DISTRICT JUDGE

[Page 16:]

MR. SHARPSTEIN: *** It is not a simple as notice. It must be plead to a jury, accepted by a jury by proof beyond a reasonable doubt, and proven by evidence sufficient to rise to that standard.

I'll cut to the quick here: For example, in the conspiracy, if they, the government, wished to have Fernandez held responsible for more than 150 kilograms of cocaine, it is not I, as a defense lawyer, that has to ask a jury through a special verdict form by my request. It's the government's burden to ask through an indictment that, for example, they chose here twice to supersede the indictment.

The first indictment was silent on any amount of cocaine.

They talked in terms of a detectible amount.

In the first superseding indictment, they kept it the same. They added a defendant, I believe.

In the second superseding indictment, they chose, in the conspiracy, to allege Fernandez -- the conspiracy to involve 5 kilograms or more, and that's how they pled it. And the same way they pled the other two counts.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 00-210-CR-HUCK

UNITED STATES OF AMERICA,

Plaintiff,

vs. MIAMI, FLORIDA

GIRALDO ORLANDO FERNANDEZ,

JANUARY 4, 2001

Defendant.

EXCERPT FROM DAY 2 OF SENTENCING
BEFORE THE HONORABLE PAUL C. HUCK,
UNITED STATES DISTRICT JUDGE

[Page 10:]

MR. SHARPSTEIN: Just to make the point, because you have to make this finding as you do every other issue.

Our objection under Apprendi is they're bound by the minimum as they said in Apprendi, the 5 year minimum guideline, the 5 kilo guideline. If you wanted to double it based on the two substantive counts, you could go to 10, but no more as far as the kilos are concerned. And that's what you should be bound by under Apprendi and the logic that because otherwise you would be interjecting into your decision that the jury had decided 150 kilos when there was no proof of it.

Not only was there no charging of it, there was no verdict

of it, there was no -- and it's not my job to ask for a special verdict, it's the prosecution's, as they say in Apprendi. And nothing was done here. So how do you know the jury went so far as 150 kilograms of cocaine? You can't do that and we are objecting. And under Apprendi, we believe you are bound to keep it within that 10 year -- I mean that 10 kilogram, 32 level guideline.

THE COURT: Mr. Sharpstein, you always are very persuasive. You may, at the end of the day, carry the day. I just hope the 11th Circuit and other courts clarify this for the district judges. But I think that I can't look in the crystal ball and figure out what the 11th Circuit or the Supreme Court ultimately is going to do on this.

I think, under the current state of the law, it's appropriate for me to hold and I do hold that Apprendi does not preclude me from looking at the actual evidence as to the amount of drugs that were involved in this case.

So that's going to be my ruling on that issue.

[Page 20:]

THE COURT: That's right. And I'm not basing my decision on that theory. My basis for the opinion and judgment is going to be, going through the record, I have found specific evidence which attributes specifically to Mr. Fernandez well in excess of 150 kilograms of cocaine.

[Page 28]:

THE COURT: *** It is my view he is not an organizer or leader. But the evidence does show he was at least a manager or supervisor.

PROBATION OFFICER: The total offense level would

become 41, and based on the fact the defendant has a criminal history category one, the guideline imprisonment range becomes 324 months to 435 months.

[Page 33:]

THE COURT: *** Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Giraldo Orlando Fernandez, is hereby sentenced to the custody of the Bureau of Prisons to be imprisoned for a term of 324 months as to each of Counts 1, 2, and 3, and those are to run consecutively with each other.

[Page 35:]

THE COURT: *** It is also ordered that the defendant, Mr. Fernandez, is assessed $100 for each of the three counts, for a total of $300, and that amount is due immediately.